

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO. C07-0475 MJP

JOINT STATUS REPORT AND
DISCOVERY PLAN

CLASS ACTION

Scheduling Conference Jointly
Requested by Parties

The parties to the above-entitled action jointly submit this Joint Status Report and
Discovery Plan, pursuant to the Court's order of May 14, 2007.

1. Nature and complexity of the case. Plaintiff filed this proposed nationwide
consumer class action alleging that defendant has committed a breach of warranty and contract
obligations, and engaged in deceptive and unfair conduct in the marketing and selling of its new
Windows Vista operating system. Plaintiff and putative class members seek rescission,
damages, and such other relief as may be available against defendant pursuant to the Magnuson-
Moss Warranty Act, 15 U.S.C. § 2301 et seq., common law, and the Washington Consumer
Protection Act, ch. 19.86 RCW. In sum, plaintiff alleges that, in order to boost the sales of PCs

JOINT STATUS REPORT - 1
No. C07-0475 MJP

GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
Phone (206) 467-6477
Fax (206) 467-6292

1 bearing the soon-to-be-replaced Windows XP operating system Microsoft essentially engaged in
2
3 bait and switch—assuring consumers they were purchasing “Vista Capable” PCs through
4
5 Microsoft’s sticker certification program, when, in fact, the consumers targeted by Microsoft
6
7 could obtain only, or were provided with, a stripped-down operating system lacking the
8
9 functionality and features that Microsoft touted as “Vista.”

10
11 Microsoft believes that plaintiff has not stated a claim under any of her theories and
12
13 moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6). That motion was noted
14
15 for June 22, 2007. Microsoft contends that the “Windows Vista Capable” logo computer
16
17 manufacturers placed on some PCs helped buyers select PCs that could be upgraded to a
18
19 Windows Vista edition after it became available to the general public in January 2007, and that
20
21 computer manufacturers, retailers, magazines, newspapers, online sources, and Microsoft widely
22
23 disclosed the PC hardware needed to run the features of the various Windows Vista editions.
24
25 Similarly, Microsoft contends that the terms of the “Express Upgrade” program under which PC
26
27 buyers could upgrade to Windows Vista for free or at a reduced price were fully disclosed.

28
29 2. ADR method. The parties agree that mediation is the appropriate ADR method.

30
31 3. Timing of ADR. The parties agree that a meaningful ADR session can only take
32
33 place after choice of law, class certification, and dispositive motions are heard, and will set a
34
35 date certain for such an ADR session or sessions upon the resolution of these motions if it
36
37 appears that ADR may be helpful at that time. The parties would expect ADR to occur beyond
38
39 four months after the date of this report. See also ¶ 10 below.

40
41 4. Deadline for joining additional parties. Excluding putative class members,
42
43 additional parties are to be joined by September 1, 2007.
44
45

1 5. Discovery Plan.

2
3 A. Date Rule 26(f) conference took place: June 7, 2007

4
5 Date Rule 26(a) initial disclosures took place: June 18, 2007

6
7 B. Discovery subjects. To minimize expense and to help streamline the
8
9 discovery process, the parties agree to conduct discovery in two principal phases. First, the
10 parties will engage in discovery relating to the full and fair presentment of the class certification
11 motion, including any merits discovery that may be required to address the factors set forth in
12 Rule 23. Second, if the motion is granted, the parties will engage in merits discovery, including
13 liability, expert, and damages discovery as is necessary to prepare for trial.
14
15

16
17 C. Discovery limitations. The parties agree that it is too early to ascertain
18 what, if any, changes in the limitations on discovery imposed by the civil rules may be necessary
19 in this case and jointly propose, for present purposes, to abide by the existing limitations set forth
20 in the civil court rules.
21
22

23 D. Discovery management. The parties intend to minimize the expense of
24 discovery by completing discovery in the phases discussed above and by using limited
25 interrogatories.
26
27

28 E. Discovery orders: None at the present time.
29
30

31 6. Discovery completion. Plaintiff contends that discovery should be completed by
32 June 2, 2008. Microsoft contends that discovery should be completed by October 2, 2008.
33
34

35 7. Magistrate Judge. The parties do not agree to the Court's assigning the case to a
36 full-time Magistrate Judge.
37
38

39 8. Bifurcation. The parties agree that the case should not be bifurcated.
40
41
42
43
44
45

1 9. Pretrial Statements and Order. The parties agree to retain the requirements of a
 2
 3 pretrial statement and order called for by CR 16(e), (h), (i), and (l).
 4

5 10. Shortening or simplifying the case. Plaintiff intends to file a motion (to be noted
 6
 7 for hearing on July 27, 2007 under CR 7(d)(3)) asking the Court to rule as a matter of law that
 8
 9 Federal law and Washington law alone apply to the entirety of this case. Plaintiff contends that
 10
 11 the Court's ruling (either way) on this preliminary issue will help focus and narrow the
 12
 13 presentment of relevant issues on plaintiff's motion for class certification.
 14

15 Microsoft believes that attempting to determine the law to be applied to plaintiff, a
 16
 17 Washington resident, and the proposed class members who reside in all 50 states, by such a
 18
 19 motion, would waste the Court's and the parties' resources, and be premature because the laws to
 20
 21 be applied depend upon evidence to be gathered and submitted with the parties' class
 22
 23 certification papers. Microsoft believes that the law to be applied to the proposed class is a class
 24
 25 certification issue that should be decided as part of the Court's ruling on plaintiff's motion for
 26
 27 class certification.
 28

29 With the Court's permission and respecting the Court's schedule (see also ¶ 16 hereto
 30
 31 regarding joint request for scheduling conference), plaintiff proposes the following briefing
 32
 33 schedule on plaintiff's choice of law and class certification motions:
 34

<u>Event</u>	<u>Date</u>
Plaintiff to file choice of law motion (noted under CR 7(d)(3))	July 12, 2007
Defendant to file opposition to choice of law motion	July 23, 2007
Plaintiff to file reply on choice of law motion	July 27, 2007

<u>Event</u>	<u>Date</u>
Noting date on choice of law motion	July 27, 2007
Plaintiff to file motion for class certification [to be noted for consideration 35 days after filing]	September 6, 2007 or 20 days after Court's ruling on choice of law motion, whichever is later
Defendant to file opposition to class certification motion	20 days after service of plaintiff's motion
Plaintiff to file reply brief in support of class certification	10 days after service of defendant's opposition
Hearing on class certification motion (if ordered)	[Discretion of Court]

Microsoft proposes that the Court not permit plaintiff to file a choice of law motion but rather consider choice of law issues on plaintiff's class certification motion on the following briefing schedule:

<u>Event</u>	<u>Date</u>
Plaintiff to file motion for class certification with all evidence, including fact and expert declarations, on which she intends to rely in seeking class certification	September 6, 2007
Microsoft to file opposition to class certification motion with all evidence, including fact and expert declarations, on which it intends to rely in opposing class certification	90 days after service of plaintiff's motion (120 days if plaintiff submits an expert declaration in support of motion)
Plaintiff to file reply brief in support of class certification	30 days after service of Microsoft's opposition
Hearing on class certification motion (if ordered)	[Discretion of Court]

Plaintiff believes that, given the complexity of the issues on both the choice of law and the class certification motions, a full and fair presentment of the relevant issues requires

deviation from the page limits provided by the civil rules. Plaintiff therefore requests that the Court permit the following page limits for the parties' respective briefs on the two motions, as follows:

<u>Brief/Motion</u>	<u>Page limit</u>
Plaintiff's choice of law motion	35
Defendant's opposition to choice of law motion	35
Plaintiff's reply in support of choice of law motion	20
Plaintiff's class certification motion	30
Defendant's opposition to class certification motion	50
Plaintiff's reply in support of class certification motion	20

Microsoft agrees to the page limits on briefs regarding plaintiff's class certification motion.

11. Trial readiness. Considering the time necessary to present and adjudicate motions, engage in discovery, provide notice to the class (if a class is certified), and prepare for trial, plaintiff expects the case will be ready for a trial on September 1, 2008. Microsoft expects the case will be ready for a trial on January 29, 2009.

12. Jury trial. Plaintiff demanded a jury trial in her Amended Complaint.

13. Trial days. The parties expect they will need 10 trial days to present this case, including voir dire.

14. Trial counsel.

A. For the Plaintiffs:

Jeffrey I. Tilden
Jeffrey M. Thomas
Michael Rosenberger
Mark A. Wilner
Gordon Tilden Thomas & Cordell LLP
1001 4th Avenue, Suite 4000
Seattle, WA 98154
206-467-6477

William C. Smart
Ian S. Birk
Keller Rohrback L.L.P.
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
206-623-1900

B. For Microsoft:

Stephen M. Rummage
Cassandra Kinhead
Charles S. Wright
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206-622-3150


Charles B. Casper
Patrick T. Ryan
Montgomery, McCracken, Walker & Rhoads, LLP
123 S. Broad Street
Philadelphia, PA 19109
(215) 772-1500

15. Timing of service. Service has been completed.

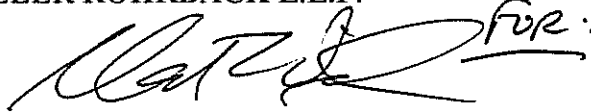
16. Scheduling conference: The parties jointly request a scheduling conference
before the Court enters its scheduling order.

1 DATED this 25th day of June, 2007.

2
3 **GORDON TILDEN THOMAS & CORDELL LLP**

4
5 By 
6
7 Jeffrey I. Tilden, WSBA #12219
8 Jeffrey M. Thomas, WSBA #21175
9 Michael Rosenberger, WSBA #17730
10 Mark A. Wilner, WSBA #31550
11

12
13 **KELLER ROHRBACK L.L.P.**

14 By  *for*:
15
16 William C. Smart, WSBA #8192
17 Ian S. Birk, WSBA #31431
18

19 Attorneys for Plaintiff

20
21 **DAVIS WRIGHT TREMAINE LLP**

22
23 By s/ Stephen M. Rummage
24 Stephen M. Rummage, WSBA #11168
25 Cassandra Kinkead, WSBA #22845
26 Charles S. Wright, WSBA #31940
27

28 *Of counsel:*

29 Charles B. Casper
30 Patrick T. Ryan
31 Montgomery, McCracken, Walker & Rhoads, LLP
32 123 S. Broad Street
33 Philadelphia, PA 19109
34 (215) 772-1500
35

36 Attorneys for Defendant
37
38
39
40
41
42
43
44
45

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following.

Counsel for Defendant Microsoft Corporation

Stephen M. Rummage, WSBA #11168
Cassandra Kinkead, WSBA #22845
Charles S. Wright, WSBA #31940
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
steверummage@dwt.com
cassandrakinkead@dwt.com
charleswright@dwt.com

GORDON TILDEN THOMAS & CORDELL LLP

By 

Mark A. Wilner, WSBA #31550
Attorneys for Plaintiff
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
Email: mwilner@gordontilden.com